

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA, INC., et al.,

Defendants.

CASE NO. C10-1823JLR

ORDER ON MOTIONS FOR  
JUDGMENT AS A MATTER OF  
LAW

MOTOROLA MOBILITY, INC., et  
al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

**I. INTRODUCTION**

Before the court are two motions: (1) Defendant Motorola Mobility, LLC,  
Motorola Solutions, Inc., and General Instrument Corp.’s (collectively, “Motorola”) Rule

1 50(a) motion for judgment as a matter of law (Motorola Mot. (Dkt. # 904)); and (2)  
2 Motorola's renewed Rule 50(a) motion for judgment as a matter of law (Motorola  
3 Renewed Mot. (Dkt. # 905)).

4 This case was tried to a jury on the question of whether Motorola breached certain  
5 contracts, and specifically its duty of good faith and fair dealing, with respect to licensing  
6 patents to Plaintiff Microsoft Corporation ("Microsoft").

7 Motorola made both of these motions during trial—one at the close of Microsoft's  
8 case-in-chief and the second at the close of all evidence. The two motions are  
9 substantively very similar. In each, Motorola argues that Microsoft has presented  
10 insufficient evidence for the jury to find for Microsoft on Microsoft's breach of contract  
11 claims. Having presided over the jury trial and reviewed the record, the governing law,  
12 and the submissions of the parties, the court concludes that Motorola is not entitled to  
13 judgment as a matter of law. There was sufficient evidence presented at trial for a  
14 reasonable jury to find for Microsoft. This was true both after the close of Microsoft's  
15 case-in-chief and at the close of evidence. Considering itself fully advised, the court  
16 DENIES both motions.

## 17 **II. BACKGROUND**

18 This is a breach of contract case between Microsoft and Motorola. Microsoft  
19 claims that Motorola has an obligation to license patents to Microsoft at a reasonable and  
20 non-discriminatory ("RAND") rate, and that Motorola breached its RAND obligations.  
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1 (See generally Am. Compl. (Dkt. # 53).) Microsoft sued Motorola for breach of contract  
2 in this court in November, 2010.<sup>1</sup> (See *id.*)

3 Motorola's RAND commitment arises out of its and Microsoft's relationship with  
4 two international standard-setting organizations ("SSOs"), the Institute of Electrical  
5 Electronics Engineers ("IEEE") and the International Telecommunication Union ("ITU").  
6 These organizations create standards for use in designing and manufacturing technology  
7 products. These and other SSOs play a significant role in the technology market by  
8 allowing companies to agree on common technological protocols so that products  
9 complying with the standards will work together.

10 The standards at issue in this case involve wireless communications, commonly  
11 known as "WiFi," and video coding technology. More specifically, this case involves  
12 two standards: an IEEE wireless local area network ("WLAN") standard called the  
13 "802.11 Standard" and an ITU<sup>2</sup> advanced video coding technology standard called the  
14 "H.264 Standard."

15 Both of these standards incorporate patented technology. Thus, in order for a  
16 company to practice the standard, it is necessary for that company to utilize technology  
17 that is covered by one or more patents. Patents that are essential to the standard (in that  
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19 <sup>1</sup> This matter has a complex procedural history involving claims and counterclaims  
20 relating to Microsoft's breach of contract claim. Prior court orders provide a more complete  
21 procedural and factual history of the case with citations. (See 2/27/12 Order (Dkt. # 188); 6/6/12  
22 Order (Dkt. # 335); 10/10/12 Order (Dkt. # 465); 4/25/13 Order (Dkt. # 681).)

<sup>2</sup> The ITU developed the H.264 Standard jointly with two other SSOs—the International  
Organization for Standardization and the International Electrotechnical Commission.

1 they must be practiced to accomplish the standard) are called standard essential patents,  
2 or “SEPs.” The existence of SEPs is a common problem in the world of technology  
3 standards. To deal with this problem, SSOs have devised a solution. To make it easier  
4 for companies to practice their standards, SSOs seek commitments from the owners of  
5 SEPs to license their patents to standard-users on RAND terms. Motorola owns patents  
6 that are essential to the 802.11 and H.264 Standards and has committed to license them  
7 on RAND terms.

8 On October 21, 2010, Motorola sent Microsoft a letter offering to license  
9 Motorola’s 802.11 SEPs. Motorola offered to license its patents at what it considered the  
10 RAND rate of 2.25 % of the price of the end product:

11 This letter is to confirm Motorola’s offer to grant Microsoft a worldwide  
12 non-exclusive license under Motorola’s portfolio of patents and pending  
13 applications having claims that may be or become Essential Patent Claims  
14 (as defined in section 6.1 of the IEEE bylaws) for a compliant  
15 implementation of the IEEE 802.11 Standards. . . . Motorola offers to  
16 license the patents under reasonable and non-discriminatory terms and  
17 conditions (“RAND”), including a reasonable royalty of 2.25 % per unit for  
18 each 802.11 compliant product, subject to a grant back license under the  
19 802.11 essential patents of Microsoft. As per Motorola’s standard terms,  
20 the royalty is calculated based on the price of the end product (e.g, each  
21 Xbox 360 product) and not on component software (e.g., Windows Mobile  
22 Software).

(10/21/10 Offer Ltr. (Dkt. # 79-5) at 2.) On October 29, 2010, Motorola sent a similar  
letter offering to license its H.264 SEPs on similar terms. The letter again offered a  
royalty rate of 2.25 % of the end product price:

Motorola offers to license the patents on a non-discriminatory basis on  
reasonable terms and conditions (“RAND”), including a reasonable royalty,  
of 2.25 % per unit for each H.264 compliant product, subject to a grant  
back license under the H.264 patents of Microsoft, and subject to any

1 Motorola commitments made to JVT in connection with an approved H.264  
2 recommendation. As per Motorola's standard terms, the royalty is  
3 calculated based on the price of the end product (e.g., each Xbox 360  
4 product, each PC/laptop, each smartphone, etc.) and not on component  
5 software (e.g., Xbox 360 system software, Windows 7 software, Windows  
6 Phone 7 software, etc.).

7 (10/29/10 Offer Ltr. (Dkt. # 79-6) at 2.)

8 Eleven days later, on November 9, 2010, Microsoft initiated this breach of  
9 contract action against Motorola based on Motorola's two offer letters, claiming that the  
10 letters breached Motorola's RAND commitments to the IEEE and the ITU. (*See*  
11 *generally* Am. Compl.) Microsoft alleged that Motorola's offer letters constituted a  
12 refusal to offer Motorola's SEPs on RAND terms. (*Id.* ¶ 84.) Microsoft also alleged that  
13 Motorola breached its RAND commitment by filing other lawsuits involving Motorola-  
14 owned SEPs which seek to enjoin Microsoft's implementation of the standards. (*Id.*  
15 ¶ 85.) In a previous order, the court held that these RAND commitments create  
16 enforceable contracts between Motorola and the respective SSO. (2/27/12 Order (Dkt.  
17 # 188).) The court has also held that Microsoft—as a standard-user—can enforce these  
18 contracts as a third-party beneficiary. (*See id.*) In a separate prior order, the court  
19 interpreted Motorola's commitments to the ITU and IEEE as requiring initial offers by  
20 Motorola to license its SEPs to be made in good faith. (6/6/12 Order (Dkt. # 335) at 25.)  
21 However, the court also held that initial offers do not have to be on RAND terms so long  
22 as a RAND license eventually issues. (*Id.*; *see also* 10/10/12 Order (Dkt. # 465).)

23 In November 2012, the court conducted a bench trial to determine a RAND rate  
24 and range to assist the finder-of-fact in determining whether or not Motorola had

breached its RAND commitments. On April 19, 2013, the court issued its Findings of Fact and Conclusions of Law (“FFCL”) under seal and then issued a public version, with redactions, on April 25, 2013. (*See* FFCL (Dkt. ## 673 (sealed), 681 (public).) The court’s FFCL set a RAND rate and range for Motorola’s 802.11 and H.264 SEP portfolios. (*See generally id.*)

Next, the case was tried to a jury to determine whether Motorola breached its RAND obligations. At trial, Microsoft contended that Motorola breached its RAND obligations by (1) offering its 802.11 and H.264 patents at a rate that was not RAND; (2) seeking injunctive relief for Microsoft’s infringement of Motorola’s SEPs; and (3) not issuing a patent license to Microsoft’s 802.11 chip supplier, Marvell. At the close of Microsoft’s case-in-chief, Motorola made a motion for judgment as a matter of law under Rule 50(a). (*See* Motorola Mot.) At the close of all evidence, Motorola renewed the motion. (*See* Renewed Mot.)

### III. ANALYSIS

#### A. Standard on a Rule 50(a) Motion

Under Rule 50(a), a court should grant a motion for judgment as a matter of law if “a reasonable jury would not have a legally sufficient evidentiary basis” to find for the non-moving party:

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

A. resolve the issue against the party; and

B. grant a motion for judgment as a matter of law against the party on a claim or defense that, under controlling law, can be maintained or defeated only with a favorable finding on that issue.

1 Fed R. Civ. P. 50(a). The court must view the evidence in the light most favorable to the  
2 non-moving party and draw all inferences in the non-moving party's favor. *Reeves v.*  
3 *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). The court should grant a  
4 Rule 50(a) motion only if it concludes that no reasonable jury could find in favor of the  
5 non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (The Rule  
6 50(a) standard "mirrors" the standard on a summary judgment motion, and the trial judge  
7 must direct a verdict if, under the governing law, "there can be but one reasonable  
8 conclusion as to the verdict."); *Santa Clara Valley Distrib. Co., Inc. v. Pabst Brewing*  
9 *Co.*, 556 F.2d 942, 944 (9th Cir. 1977). Importantly, the court may not make credibility  
10 determinations or weigh the evidence. *Reeves*, 530 U.S. at 150-51. The court may not  
11 base its ruling on speculation, *see Nelson v. Pima Community College*, 83 F.3d 1075,  
12 1081-82 (9th Cir. 1996), but must base it instead on facts and evidence. *See McSherry v.*  
13 *City of Long Beach*, 584 F.3d 1129, 1136 (9th Cir. 2009).

14 **B. Motorola's Motions**

15 At the outset, the court notes that Motorola's first motion is very similar to its  
16 second. (*Compare* Motorola Mot. with Motorola Renewed Mot.) In fact, it appears that  
17 there are very few differences between the two beyond a handful of stylistic changes and  
18 several different legal arguments. (*Id.*) For purposes of this order, the court considers all  
19 the legal arguments from both motions together. Further, the court does not respond to  
20 each argument twice, finding that the evidence presented after Microsoft's case-in-chief  
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1 does not alter any of the court's rulings and, therefore, all of the rulings below apply to  
2 both motions.

3 Motorola's motions are, in essence, an attempt to re-argue theories that Motorola  
4 has already argued either to the jury or the court. Put simply, Motorola and Microsoft  
5 both made their cases to the jury, and after a seven-day trial there was enough evidence  
6 on each side for the jury to decide for either party. The court is not permitted to weigh  
7 the evidence or make credibility determinations, and will not do so given the substantial  
8 amount of evidence each side has marshaled on its behalf. To rule in Motorola's favor  
9 would require viewing the evidence in the light most favorable to Motorola, the moving  
10 party. This is the opposite of what the law requires. *See Reeves*, 530 U.S. at 150-51. For  
11 this reason and for the reasons explained below, the court DENIES both of Motorola's  
12 motions.

### 13 1. Good Faith Standard

14 In ruling on these motions, the court is mindful of the fact that the jury was asked,  
15 first and foremost, to determine whether Motorola breached its duty of good faith and fair  
16 dealing in carrying out its contractual commitments to the IEEE and the ITU.<sup>3</sup> (*See Jury*  
17 *Instructions* (Dkt. # 908).) Microsoft advanced three different theories of breach at trial,  
18 but all of them ultimately circled back to the question of whether Motorola acted in good

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20 <sup>3</sup> The jury instructions were broad enough to permit an argument for a more prototypical  
21 (i.e., direct) breach of contract claim as well. (*See Jury Instructions* (Dkt. # 908).) However, the  
22 court addressed this point in an earlier ruling (*see* 8/12/13 Order (Dkt. # 843) at 21-24  
("Microsoft's claim is a claim for breach of the duty of good faith and fair dealing, and the court  
will treat it as such going forward.")) and will not address it again here because one winning  
theory for Microsoft (breach of the good faith duty) is sufficient to deny these motions.



1 faith in carrying out its contractual commitments. Microsoft's theories were (1) that  
2 Motorola's opening offer letters amounted to a breach of the good faith duty; (2) that  
3 Motorola's conduct in seeking injunctive relief breached the good faith duty; and (3) that  
4 Motorola breached the good faith duty through its conduct with respect to Marvell,  
5 Microsoft's 802.11 chip supplier. (See Microsoft's Rog. Resp. (Dkt. # 733-6) at 23-26.)  
6 In addition, Microsoft argued that all of this conduct, considered as a whole, added up to  
7 a course of conduct that breached the good faith duty. To summarize: for each and every  
8 theory of breach, the jury was asked to analyze whether Motorola's conduct violated the  
9 duty of good faith and fair dealing. (See Jury Instructions at 22-24, 26, 29.)

10 Accordingly, to assist the jury, the court set forth the following standard by which  
11 the jury was to judge Motorola's conduct and decide if it was in good faith. (8/12/13  
12 Order (Dkt. # 843) at 10-14.) The court instructed the jury on this standard. (See Jury  
13 Instructions at 22-23.) Thus, this is the operative standard under which Motorola's  
14 sufficiency of the evidence claims must be judged:

15 A duty of good faith and fair dealing is implied in every contract.  
16 *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991). This duty  
17 requires the parties to a contract to cooperate with each other so that each  
18 may obtain the full benefit of performance, even if the parties have different  
19 requirements under the contract. *Id.* (citing *Metro. Park Dist. of Tacoma v.*  
20 *Griffith*, 723 P.2d 1093, 1100 (Wash. 1986)). However, this duty does not  
21 require a party to accept a material change in the terms of its contract. *Id.*  
22 (citing *Betchard-Clayton, Inc. v. King*, 707 P.2d 1361, 1364 (Wash. Ct.  
App. 1985). The implied duty of good faith and fair dealing arises out of  
the obligations created by a contract and only exists in relation to the  
performance of specific contract terms. *Keystone Land & Dev. Co. v.*  
*Xerox Corp.*, 94 P.3d 945, 949 (Wash. 2004). Thus, a party's obligation is  
only to perform the obligations imposed by the contract in good faith.  
*Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 700 P.2d 338, 342 n.6  
(Wash. Ct. App. 1985). There is no "free-floating" duty of good faith and

1 fair dealing that injects substantive terms into the parties' contract. *Id.*;  
2 *Keystone*, 94 P.3d at 949.

3 There is no one-size-fits-all definition of good faith and fair dealing.  
4 Rather, the duty varies somewhat with the context in which it arises. *See*  
5 *RESTATEMENT (SECOND) OF CONTRACTS* § 205 cmt. d. It may violate the  
6 duty of good faith and fair dealing to, for example, (1) evade the spirit of a  
7 bargain; (2) willfully render imperfect performance; (3) interfere with or  
fail to cooperate in the other party's performance; (4) abuse discretion  
granted under the contract; or (5) perform the contract without diligence.  
*Id.* This list is in no way exhaustive, and indeed it would be nearly  
impossible to create a complete catalogue of conduct that violates the duty  
of good faith and fair dealing. *Id.*

8 It is the fact finder's job—in this case the jury—to determine  
9 whether a party breached its duty of good faith and fair dealing. *See, e.g.,*  
10 *Columbia Park Golf Course, Inc. v. City of Kennewick*, 248 P.3d 1067,  
1074 (Wash. Ct. App. 2011). Good faith performance of a contract requires  
11 being faithful to the agreed common purpose of the contract and  
performing consistently with the justified expectations of the other parties.  
12 *Frank Coluccio Const. Co., Inc. v. King County*, 150 P.3d 1147, 1155  
(Wash. Ct. App. 2007) (citing *RESTATEMENT (SECOND) OF CONTRACTS*  
13 § 205 cmt. a). On the other hand, bad faith performance involves conduct  
that violates community standards of decency, fairness, or reasonableness.  
14 *RESTATEMENT (SECOND) OF CONTRACTS* § 205 cmt. a; *G Four Bellingham, LLC v. Oishii Teriyaki, Inc.*, 2008 WL 176389, at \*3  
(Wash. Ct. App. 2008) (citing *RESTATEMENT (SECOND) OF CONTRACTS*  
15 § 205 cmt. a) (unpublished).

16 Washington law establishes that numerous considerations may  
inform a fact-finder's determination of whether the defendant's conduct  
17 violated the covenant of good faith and fair dealing. In particular, a review  
of state and federal case law reveals that a fact finder may consider: (1)  
18 whether the defendant's actions were contrary to the reasonable and  
justified expectations of other parties to the contract, *Scribner*, 249 F.3d at  
909; *Frank Coluccio*, 150 P.3d at 1155 (citing *RESTATEMENT (SECOND) OF*  
19 *CONTRACTS* § 205 cmt. a); (2) whether the defendant's conduct would  
frustrate the purpose of the contract, *Aventa Learning, Inc. v. K12, Inc.*, 830  
20 F. Supp. 2d 1083, 1101 (W.D. Wash. 2011) ("The duty prevents a  
contracting party from engaging in conduct that frustrates the other party's  
21 right to the benefits of the contract.") (citing *Woodworkers of Am. v. DAW*  
*Forest Prods. Co.*, 833 F.2d 789, 795 (9th Cir. 1987)); *Cavell v. Hughes*,  
22 629 P.2d 927, 929 (Wash. Ct. App. 1981); (3) whether the defendant's

conduct was commercially reasonable, *Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006) (applying Washington law); *Vylene Enters., Inc. v. Naugles, Inc.*, 90 F.3d 1472, 1477 (9th Cir. 1996) (applying California law); (4) whether and to what extent the defendant's conduct conformed with ordinary custom or practice in the industry, *Curtis v. Northern Life Ins. Co.*, 2008 WL 4927365, at \*6 (Wash. Ct. App. 2008) (unpublished); *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d, 321-23 (Cal. Ct. App. 2010); (5) to the extent the contract vested the defendant with discretion in deciding how to act, whether that discretion was exercised reasonably, *Craig*, 458 F.3d at 752; *Aventa*, 830 F. Supp. 2d at 1101; and (6) subjective factors such as the defendant's intent and motive. *See Scribner*, 249 F.3d at 910 (“[A] party can breach the duty of good faith and fair dealing by acting dishonestly.”); *Cavell*, 629 P.2d at 929 (considering the “purpose,” knowledge, and intent behind defendant's conduct to assess good faith); *Jones v. Hollingsworth*, 560 P.2d 348, 351-52 (1977) (considering subjective intent of defendant to determine whether duty of good faith and fair dealing was met with respect to a particular contract term vesting defendant with discretion).

The last consideration, subjective intent, is a subject of frequent dispute between the parties and so requires some elaboration. Several Washington cases have considered subjective factors in determining whether a party violated its duty of good faith and fair dealing. *See Cavell*, 629 P.2d at 929; *Hollingsworth*, 560 P.2d at 351-52. Thus, the court concludes that, under Washington law, these factors are relevant to the good faith inquiry. However, other cases have made it clear that bad motive does not equate to bad faith and good motive does not equate to good faith. *See, e.g., Scribner*, 249 F.3d at 910 (“Dishonesty or an unlawful purpose is [not] a necessary predicate to proving bad faith.”). To be more specific, bad motive or intent does not necessarily imply bad faith, *see Frank Coluccio*, 150 P.3d at 1155 (no bad faith if parties are faithful to agreed common purpose and perform consistently with the justified expectations of the other parties), and good motive or intent does not necessarily imply good faith, *Scribner*, 249 F.3d at 910 (“[F]air dealing may require more than honesty.” (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d)). Likewise, bad motive or intent is not a prerequisite to bad faith, *Scribner*, 249 P.2d at 910, nor is good motive or intent a prerequisite to good faith, *see Frank Coluccio*, 150 P.3d at 1155.

(8/12/13 Order at 10-14 (footnotes omitted).)

1 In light of this standard, the court observes that Motorola's motion is permeated by  
2 a false distinction. Throughout its motion, Motorola argues that there is insufficient  
3 evidence for a reasonable jury to find (1) subjective bad faith or (2) objective bad faith,  
4 treating these as separate topics and presenting different arguments with respect to each.  
5 (*Id.* at 10-12.) This is a non sequitur. The jury was never instructed to make separate  
6 findings of subjective or objective good faith. (*See* Jury Instructions at 22-23.) Rather,  
7 as explained above, the jury was instructed to make a single finding of whether Motorola  
8 breached its duty of good faith and fair dealing. (*See id.*) Indeed, subjective intent is one  
9 of the factors the jury was instructed to consider in determining bad faith. (*Id.* at 23.)  
10 The jury was also instructed that subjective intent alone is not dispositive. (*Id.* ("If you  
11 consider subjective factors such as Motorola's intent or motive, you must be aware that  
12 this is only one consideration and it need not dictate your final decision. Bad motive or  
13 intent does not necessarily imply bad faith, and good motive or intent does not  
14 necessarily imply good faith. Likewise, bad motive or intent is not a prerequisite to bad  
15 faith, nor is good motive or intent a prerequisite to good faith.")) Thus, Motorola's  
16 decision to frame the issue in this way only confuses matters, and the court will not give  
17 credence to this distinction going forward.

18 2. Motorola's argument with respect to offer letters

19 Motorola's motion begins with an argument that no reasonable jury could  
20 conclude that Motorola breached its good faith duty by sending the October 2010 offer  
21 letters. Specifically, Motorola argues that "Microsoft has not put forth sufficient  
22 evidence from which a reasonable jury could find that Motorola breached the duty of

1 good faith and fair dealing.” (Motorola Renewed Mot. at 10.) Motorola makes several  
 2 arguments in this regard. Motorola argues that (1) it followed industry custom and  
 3 practice by making an opening offer with an expectation that negotiations would follow;  
 4 (2) it did not frustrate the purpose of the contract because there is no “real-world  
 5 evidence” of “hold up,” and in fact the evidence at trial showed that hold up is not a  
 6 problem in the real world; and (3) no reasonable jury could find that Motorola failed to  
 7 act in accordance with the reasonable expectations of the parties.

8 All of this reflects Motorola’s interpretation of the evidence at trial and ignores the  
 9 evidence actually presented by Microsoft. Microsoft presented a substantial amount of  
 10 evidence on the subject of the offer letters breaching the good faith duty—indeed, it was  
 11 a major focus of Microsoft’s presentation. Microsoft presented a substantial amount of  
 12 evidence supporting its theory that Motorola’s actions did not conform with industry  
 13 custom and practice. (*See, e.g.*, 8/27/13 Tr. (DeVaun Testimony) 18:13-15; 8/27/13 Tr.  
 14 (Treadwell Testimony) 41:12-15; 8/28/13 Tr. (Gutierrez Testimony) 123:13-18, 121:18-  
 15 23, 144:20-1:45-9; 8/30/13 Tr. (Heiner Testimony) 160:7-161:3; 8/28/13 Tr. (Ochs  
 16 Testimony) 92:15-93:9; 8/27/13 Tr. (Dailey Testimony) 69:25-70:4; 8/29/13 Tr. (Murphy  
 17 Testimony) 164:15-165:14, 166:4-13); 8/28/13 Tr. (Glanz Testimony) 69:25-71:3, 72:19-  
 18 75:16.)

19 Microsoft also presented a substantial amount of evidence to support its theory  
 20 that Motorola’s conduct frustrated the purpose of the IEEE and ITU contracts, including  
 21 evidence of hold up, (*see, e.g.*, 8/29/13 Tr. (Murphy Testimony) 138:12-143:8, 146:23-  
 22 147:10, 135:18-136:19, 169:18-170:17; 8/27/13 Tr. (Dailey Testimony) 123:18-23,

1 124:15-125:7, 125:23-126:11; 8/29/13 Tr. (Blasius Testimony) 107:16-19), and evidence  
2 relating to “royalty stacking” (*see, e.g.*, 8/29/13 Tr. (Blasius Testimony) 108:21-25;  
3 8/29/13 Tr. (Murphy Testimony) 160:9-20, 161:3-11, 154:22-25, 160:12-20; 8/27/13 Tr.  
4 (DeVaen Testimony) 16:17-22; 8/27 13 Tr. (Treadwell Testimony) 39:19-22; 8/28/13 Tr.  
5 (Gutierrez Testimony) 128:3-21.) Motorola’s argument that hold up does not exist in the  
6 real world does not trump the evidence presented by Microsoft that hold up took place in  
7 this case.

8 Finally, Microsoft presented a substantial amount of evidence relating to the  
9 reasonable expectations of the parties. (*See, e.g.*, 8/28/13 Tr. (Gutierrez Testimony) 61:5-  
10 8, 183:24-184:16; 8/27/13 Tr. (DeVaen Testimony) 17:10-18:1; 8/27/13 Tr. (Treadwell  
11 Testimony) 40:15-22; 8/30/13 Tr. (Heiner Testimony) 141:4-143:9; 8/29/13 Tr. (Blasius  
12 Testimony) 108:7-9; 8/27/13 Tr. (Dailey Testimony) 63:3-6, 63:22-24.)

13 Further, Motorola’s arguments ignore the fact that the good faith standard  
14 articulated above is multi-faceted and no single factor is dispositive. (*See* Jury  
15 Instructions at 22-23.) Thus, even if Microsoft’s evidence were somehow lacking with  
16 respect to industry custom and practice, frustration of purpose, and the reasonable  
17 expectations of the parties, the jury could still potentially find a breach of the good faith  
18 duty because Microsoft presented a substantial amount of evidence relating to the other  
19 factors. (*See, e.g.*, 8/29/13 Tr. (Murphy Testimony) 139:12-140:2, 142:6-19 (commercial  
20 reasonableness); 8/28/13 Tr. (Gutierrez Testimony) 128:22-25, 131:12-14 (commercial  
21 reasonableness); *see also* Microsoft Resp. (Dkt. # 916) at 16-17 (unreasonable exercise of  
22

1 discretion); *id.* at 17-19 (subjective intent). Accordingly, and in light of the evidence  
2 presented at trial, the court rejects Motorola's arguments relating to offer letters.

3 3. Motorola's argument with respect to injunctive relief

4 Motorola's next set of arguments focuses on Microsoft's claim that Motorola  
5 violated its good faith duty by seeking injunctive relief to enforce its SEPs. Motorola  
6 frames its argument in terms of sufficiency of the evidence: "Microsoft has not presented  
7 evidence sufficient for a jury to find that Motorola's seeking of injunctions shows a lack  
8 of good faith." (Motorola Renewed Mot. at 15.) However, many of Motorola's  
9 arguments address issues of law that Motorola has already unsuccessfully argued to the  
10 court. The court addresses these arguments first.

11 First, Motorola argues that it did not waive its right to seek injunctive relief by  
12 agreeing to license its patents on RAND terms, that the availability of injunctive relief  
13 was an open question of law during the time frame relevant to this action, and that other  
14 courts are now finding that injunctive relief is available to enforce SEPs. (Motorola  
15 Renewed Mot. at 18-19.) Motorola raised these same arguments in its motion for  
16 summary judgment. (Motorola SJ Mot. (Dkt. # 720) at 10-14.) The court rejected them  
17 all in ruling on that motion. (8/12/13 Order at 20-25.) The court recognized that there is  
18 jurisprudential debate about the availability of injunctive relief to enforce SEPs. (*Id.* at  
19 17.) Accordingly, the court did not instruct the jury that Motorola had waived its right to  
20 seek injunctive relief, nor did it incorporate any of the equivocal jurisprudence regarding  
21 availability of injunctive relief in the SEP context. (*See* Jury Instructions.) Instead, the  
22 court instructed the jury that Motorola had an obligation to license its SEPs on RAND



1 terms, and that, in marching toward a RAND license, Motorola had an obligation to  
2 comply with the duty of good faith and fair dealing. (*See id.* at 29.) It was left to the jury  
3 to determine whether Motorola's actions in seeking injunctive relief violated the duty of  
4 good faith and fair dealing. (*See id.*) Now, Motorola argues, in effect, that the court  
5 should revisit this ruling and hold that Motorola did not waive its right to seek injunctive  
6 relief. The court stands by its earlier ruling. Motorola's arguments are meritless at this  
7 stage and the court rejects them.

8       Next, Motorola argues that seeking injunctive relief cannot be the basis for a claim  
9 for breach of the duty of good faith and fair dealing because there is no "free floating"  
10 duty of good faith. Motorola raised this argument in its summary judgment motion  
11 (Motorola SJ Mot. at 11), and the court rejected it at that time (8/12/13 Order at 20-25).  
12 It is true there is no free floating duty of good faith, as the court previously explained and  
13 instructed the jury:

14       The implied duty of good faith and fair dealing arises out of the obligations  
15 created by a contract and only exists in relation to the performance of  
16 specific contract terms. *Keystone Land & Dev. Co. v. Xerox Corp.*, 94 P.3d  
17 945, 949 (Wash. 2004). Thus, a party's obligation is only to perform the  
18 obligations imposed by the contract in good faith. *Barrett v. Weyerhaeuser*  
19 *Co. Severance Pay Plan*, 700 P.2d 338, 342 n.6 (Wash. Ct. App. 1985).  
20 There is no "free-floating" duty of good faith and fair dealing that injects  
21 substantive terms into the parties' contract. *Id.*; *Keystone*, 94 P.3d at 949.

22 (8/12/13 Order at 10-11.) Motorola argues that the good faith duty does not reach its  
efforts to obtain injunctive relief because there are no terms in Motorola's contracts with  
the IEEE and the ITU stating that Motorola may not seek injunctive relief. (Motorola  
Mot. at 16.) Motorola's argument misapprehends the court's prior ruling. The court held



1 that the RAND commitment was the contract term to which the good faith duty attached.  
2 (8/12/13 Order at 23-24.) In other words, through its contracts, Motorola committed to  
3 license its SEPs on RAND terms; in carrying out that commitment, i.e., in marching  
4 toward a RAND license, Motorola was required to comply with the duty of good faith  
5 and fair dealing:

6 Motorola committed to license its SEPs on RAND terms but, even under  
7 the confines of its contracts, it had discretion in determining an overall  
8 course of conduct in carrying out the RAND commitment: there was not  
9 one single permissible way for it to arrive at a RAND license. Thus, the  
question is whether Motorola exercised that discretion reasonably, i.e.,  
whether it complied with its duty of good faith and fair dealing in carrying  
out its obligation to license on RAND terms.

10 (*Id.*) At trial, Microsoft argued that Motorola's conduct in seeking injunctive relief was a  
11 violation of its obligation to march toward a RAND license in good faith. The court  
12 agreed that this was a valid legal theory and instructed the jury accordingly. In other  
13 words, the court has already rejected Motorola's argument. The court does so again now.

14 Next, Motorola makes a number of arguments that it already made to the jury.  
15 Motorola argues that Microsoft sued Motorola first, that Microsoft was not a "willing  
16 licensee," that there was no hold up because any injunction would require the approval of  
17 a judge, and that Microsoft refused to negotiate toward a RAND license. (Motorola  
18 Renewed Mot. at 20-21.) These are all arguments that Motorola made at trial. Motorola  
19 contends that, in light of these arguments, no reasonable jury could find a breach of the  
20 good faith duty. (*Id.*) However, Microsoft presented a substantial amount of evidence at  
21 trial in support of the conclusion that Motorola's pursuit of injunctive relief violated its  
22 good faith duty. (*See, e.g.*, 8/29/13 Tr. (Murphy Testimony) 125:11-127:2; 8/28/13 Tr.

(Gutierrez Testimony) 61:9-13, 149:13-150:5, 154:24-155:23, 155:1-152:10, 156:9-16; 8/27/13 Tr. (Dailey Testimony) 124:15-125:7; 8/30/13 Tr. (Heiner Testimony) 150:23-151:17; 8/29/13 Tr. (Blasius Testimony) 111:14-112:6; 9/3/13 Tr. (Killough Testimony) 13:3-15:10.) Microsoft certainly presented enough evidence that a jury would be justified in reaching a verdict in Microsoft's favor. To decide otherwise would require weighing the evidence, making credibility determinations, and accepting Motorola's version of the facts as true. On a Rule 50(a) motion, the court is not permitted to do this and must construe all facts in the light most favorable to the non-moving party. *Reeves*, 530 U.S. at 150-51. Accordingly, the court rejects these arguments.

Motorola's final argument with respect to injunctive relief also fails. Motorola argues, in cursory fashion, that "Microsoft has not pleaded that any actions after the filing of the injunctions in July 2011 constitute a breach." (Motorola Renewed Mot. at 21.) The court addressed a similar argument in its summary judgment order and rejected it:

The court disagrees with Motorola. First, in February 2011, Microsoft filed an amended complaint that included the allegation that Motorola breached its RAND commitment by filing lawsuits that seek to enjoin Microsoft's implementation of the standardized technology. (Am. Compl. ¶ 85.) Microsoft further alleged in its amended complaint that Motorola is not entitled to exclude or enjoin Microsoft from using the H.264 and 802.11 standards. (*Id.*) Thus, Motorola was on notice from this point forward of Microsoft's theory that seeking injunctive relief constituted a breach of the RAND commitment. Second, in the RAND context, Motorola's argument that conduct relevant to a breach must take place before or at the time of the filing of an action makes little sense. As discussed above, in certain circumstances seeking injunctive relief may constitute a breach of the RAND commitment, whereas in other circumstances such conduct may be proper. The timing of when a party seeks injunctive relief in a separate forum relative to a pending action is germane to whether that party acted in bad faith in seeking such relief. In other words, it may very well be the case that seeking injunctive relief

1 absent a pending lawsuit is good faith, whereas seeking the same relief  
2 during the pendency of litigation over a RAND rate is bad faith.

3 (8/12/13 Order at 25-26.) The court rejects Motorola's new argument on these same  
4 grounds. Specifically, the court rejects Motorola's argument because "Motorola was on  
5 notice from [February 2011] forward of Microsoft's theory that seeking injunctive relief  
6 constituted a breach of the RAND commitment" and because "in the RAND context,  
7 Motorola's argument that conduct relevant to a breach must take place before or at the  
8 time of the filing of an action makes little sense." (*Id.*) Motorola makes no valid  
9 arguments to rebut the logic of this earlier ruling.

10 Accordingly, and in light of the evidence presented at trial, the court rejects  
11 Motorola's arguments relating to injunctive relief.

#### 12 4. Motorola's argument with respect to Marvell

13 Motorola's next set of arguments focuses on Microsoft's claim that Motorola  
14 violated its good faith duty by refusing to grant a license to Marvell, Microsoft's 802.11  
15 chip supplier. (Motorola Renewed Mot. at 21-24.) Motorola argues that Microsoft lacks  
16 standing to make arguments based on Marvell (*id.* at 21), and that Microsoft did not  
17 produce enough evidence at trial for a reasonable jury to find for Microsoft based on this  
18 claim (*id.* at 21-24).

19 First, the court holds that Motorola's standing argument is not a sufficient basis to  
20 grant this motion. Motorola's argument consists of one short paragraph (*see id.* at 21),  
21 and Microsoft does not respond to it other than to say it is "irrelevant." (Microsoft Resp.  
22 at 8 n.1.) As Motorola points out, the Supreme Court has held that "even when the

1 plaintiff has alleged injury sufficient to meet the ‘case or controversy’  
2 requirement . . . the plaintiff generally must assert his own legal rights and interests, and  
3 cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v.*  
4 *Seldin*, 422 U.S. 490, 499 (1975). However, it is doubtful that this doctrine is relevant  
5 here. Microsoft is not asserting Marvell’s legal rights or interests or making any claims  
6 on its behalf. Rather, Microsoft argues that Motorola’s conduct towards Marvell (which  
7 involved Microsoft) is evidence that Motorola acted in bad faith towards Microsoft. The  
8 court explained this concept in its summary judgment order when it rejected a similar  
9 argument by Motorola:

10 [T]he RAND commitment obligates Motorola to grant a RAND  
11 license to Microsoft for Motorola’s SEPs. Motorola must act in good faith  
12 in attempting to reach the RAND license it is obligated to provide. The  
13 question for the jury is whether Motorola breached this good faith  
14 obligation by its actions. In this case, the court understands that Microsoft  
15 will argue a theory of breach that Motorola’s course of conduct over time  
demonstrates a breach of the good faith duty. Indeed, where the contract at  
issue requires the SEP owner to grant a RAND license but leaves the SEP  
owner and implementer discretion in performance of that contract, the fact  
finder may need to examine the actions of the parties over the course of the  
negotiation to ultimately determine if a party acted in bad faith.

16 Here, Microsoft contends that Motorola made a licensing offer to  
17 Marvell that explicitly excluded only Microsoft as an end purchaser of  
18 Marvell products. Presumably, Microsoft will argue that Motorola’s offer  
19 to Marvell is evidence that Motorola did not want to grant Microsoft a  
RAND license. . . . The court concludes that this evidence may form at  
least part of the basis for the jury to decide whether Motorola acted in bad  
faith.

20 (8/12/13 Order at 35-36.) Thus, Microsoft is not asserting Marvell’s rights and interests,  
21 it is merely presenting evidence that tends to show Motorola’s bad faith. The court’s  
22 decision to allow Microsoft to make this argument reflects the fact that Motorola’s course

1 of conduct in marching toward a RAND license (i.e., the course of conduct subject to the  
 2 good faith duty) may be complicated and multi-faceted and may involve third parties like  
 3 Marvell. In any event, this argument does not form a sufficient basis for granting  
 4 Motorola's motion for the reasons explained with respect to Motorola's second argument.

5 Motorola's second argument is that no reasonable jury could find a breach of the  
 6 good faith duty based on Motorola's conduct vis-à-vis Marvell. The court notes, first,  
 7 that Microsoft introduced ample evidence at trial on the topic of Marvell. However, the  
 8 court will not opine whether a reasonable jury could, or would, find a breach of the good  
 9 faith duty based on the Marvell evidence alone. The jury was not asked to do this.

10 Moreover, the court finds that Microsoft presented so much evidence with respect to  
 11 opening offers, injunctive relief, and Motorola's overall course of conduct that a  
 12 reasonable jury could find a breach of the good faith duty without considering any  
 13 Marvell evidence at all. (*See, e.g.*, 8/29/13 Tr. (Murphy Testimony) 125:11-127:2,  
 14 135:18-136:19, 138:12-143:8, 146:23-147:10, 164:15-165:14, 166:4-13, 169:18-170:17;  
 15 8/28/13 Tr. (Gutierrez Testimony) 61:5-13, 121:18-23, 123:13-18, 128:3-21, 128:22-25,  
 16 131:12-14, 144:20-145:9, 149:13-150:5, 154:24-155:23, 155:1-152:10, 156:9-16, 183:24-  
 17 184:16; 8/27/13 Tr. (Dailey Testimony) 63:3-6, 63:22-24, 69:25-70:4, 124:15-125:7,  
 18 123:18-23, 124:15-125:7, 125:23-126:11; 8/30/13 Tr. (Heiner Testimony) 141:4-143:9,  
 19 150:23-151:17, 160:7-161:3; 8/29/13 Tr. (Blasius Testimony) 107:16-19, 108:7-9,  
 20 108:21-25, 111:14-112:6; 9/3/13 Tr. (Killough Testimony) 13:3-15:10; 8/27/13 Tr.  
 21 (DeVaen Testimony) 16:17-22, 17:10-18:1, 18:13-15; 8/27/13 Tr. (Treadwell Testimony)  
 22 39:19-22, 40:15-22, 41:12-15; 8/28/13 Tr. (Ochs Testimony) 92:15-93:9; 8/28/13 Tr.

1 (Glanz Testimony) 69:25-71:3, 72:19-75:16.) Accordingly, the court will not rule on  
2 Motorola's Marvell argument, finding it to be irrelevant.

3 5. Motorola's argument with respect to overall course of conduct

4 Next, Motorola argues, in one short paragraph, that Microsoft did not elicit  
5 sufficient evidence for a reasonable jury to find that Motorola's overall course of conduct  
6 was a breach of the good faith duty. (Motorola Renewed Mot. at 24.) As discussed  
7 above, the court holds that a reasonable jury could find a breach of the good faith duty  
8 with respect to either opening offers or injunctive relief. Logically, then, a reasonable  
9 jury could also find that these actions combined amount to a breach. The court rejects  
10 Motorola's argument.

11 6. Motorola's argument with respect to damages

12 Last, Motorola argues that Microsoft did not prove damages at trial. (Renewed  
13 Mot. at 24-30.) Motorola makes two major contentions in this regard: first, as a legal  
14 matter, Motorola contends that Microsoft is not entitled to recover attorney's fees as  
15 damages. (*Id.*) Second, as a factual matter, Motorola contends that Microsoft did not  
16 produce enough evidence for a reasonable jury to conclude that Microsoft suffered  
17 damages. (*Id.*)

18 The court has already ruled against Motorola on the question of attorney's fee  
19 damages. The court settled this question in its summary judgment order:

20 [U]nder the "American rule," a party may not recover attorney's fees  
21 either as costs or as an element of damages unless a contractual, statutory,  
22 or equitable exception applies. *City of Seattle v. McCready*, 931 P.2d 156,  
160-61 ("[A]ttorney's fees are not available as *costs or damages* absent a  
contract, statute, or recognized ground in equity.") (emphasis in original).

1 Neither party argues that there is a contractual or statutory ground for  
2 allowing attorney's fees in this case, so the court turns to recognized  
exceptions in equity.

3 The Washington Supreme Court has recognized four major equitable  
4 exceptions to the American rule: (1) the common fund exception; (2)  
actions by a third person subjecting a party to litigation; (3) bad faith or  
5 misconduct of a party; and (4) dissolving wrongfully issued temporary  
injunctions or restraining orders. *Id.* at 160. These exceptions are to be  
6 construed narrowly. *Id.* at 162.

7 ...

8 Microsoft argues that the court should apply an exception that has  
not yet been recognized in Washington: the exception for violation of a  
9 covenant not to sue. (Microsoft Resp. at 24-25.) The court agrees. This  
exception applies when one party agrees not to sue the other but then does  
10 anyway. *See, e.g., Anchor Motor Freight, Inc. v. Int'l Bhd. of Teamsters,*  
*Local Union No. 377*, 700 F.2d 1067, 1072 (6th Cir. 1983); *See* Dan B.  
Dobbs, LAW OF REMEDIES, § 310(3), at 406. When this happens, the  
11 primary form of damages flowing from the breach will likely be attorney's  
fees, and it would be inequitable to deprive the aggrieved party of those  
12 damages. *See Anchor Motor Freight*, 700 F.2d at 1072; *Widener v. Arco*,  
717 F. Supp. 1211, 1217 (N.D. Tex. 1989). Thus, courts interpret a  
13 covenant not to sue as an implied agreement to protect the other party from  
the costs of litigation and decline to blindly apply the American rule. *See*  
14 *Anchor Motor Freight*, 100 F.2d at 1072; *Widener v. Arco*, 717 F. Supp. at  
1217; Dobbs, LAW OF REMEDIES, § 310(3), at 406. While this exception  
15 has been accepted in many of our nation's courts, it has been rejected in  
others. *See Bunnett v. Smallwood*, 793 P.2d 157 (Colo. 1990) (rejecting  
16 exception under Colorado law after reviewing issue in depth); *Gruver v.*  
*Midas Intern. Corp.*, 925 F.2d 280, 283-84 (9th Cir. 1991) (predicting that  
17 Oregon courts would reject exception). It appears that no Washington case  
has addressed the issue.

18  
19 Before doing so in this case, it is necessary to understand how the  
exception would apply in the RAND context. The argument for the  
20 exception's application is simple: as explained above, in certain  
circumstances it may violate the duty of good faith and fair dealing for a  
21 SEP holder to seek an injunction to enforce a RAND-committed patent.  
Under those circumstances, the SEP holder has effectively agreed not to sue  
22 implementers for injunctive relief. Thus, under those circumstances and  
those circumstances only, the RAND commitment is analogous to a



1 covenant not to sue for injunctive relief, and the implementer may recover  
2 attorney's fees as an element of damages in the bad faith action. This  
3 argument makes sense. However, it only works if, in fact, Washington  
4 courts would recognize an exception to the American rule for violation of a  
5 covenant not to sue.

6 The court predicts that, were a Washington court to consider this  
7 exception in the context of RAND, it would recognize it. There are several  
8 reasons why this is so. First, if there is one unifying principle underlying  
9 Washington's different equitable exceptions to the American rule, it is that  
10 they all involve a wrongful act by the defendant that forces the other party  
11 to defend litigation. See *McCready*, 931 P.2d at 160 (listing exceptions); cf.  
12 *Flint v. Hart*, 917 P.2d 590, 598 (Wash. Ct. App. 1996) ("An equitable  
13 ground exists 'when the natural and proximate consequences of a wrongful  
14 act by defendant involve plaintiff in litigation with others . . . ."). Thus, it  
15 is reasonable to conclude that any newly-recognized exception would  
16 follow this same pattern. In the RAND context, where the defendant is  
17 alleged to have breached its duty of good faith and fair dealing, a wrongful  
18 act is alleged and attorney's fees are a natural and proximate consequence  
19 of that act. That alone is not enough to justify an award of attorney's fees,  
20 but it does suggest that Washington courts would recognize a narrow  
21 equitable exception in this limited scenario.

22 Second, many of the justifications other courts have relied on in  
rejecting the covenant-not-to-sue exception simply do not apply in the  
RAND context. For example, the court in *Bunnett* reasoned that it would  
not be inequitable to deny attorney-fee damages because "the potential  
legal costs" of enforcing a covenant not to sue were foreseeable and the  
party enforcing it receives a benefit commensurate to the cost. 793 P.2d at  
161. This may be true with respect to ordinary two-party contracts, but  
RAND litigation is a different animal. It is one thing to require a party to  
assert a covenant not to sue as a defense to a run-of-the-mill lawsuit. It is  
another thing entirely to force a party like Microsoft to defend multiple  
injunction actions throughout the world, asserting its defense in a legal  
landscape that is far from well-travelled, after Motorola has already  
committed to license its patents on RAND terms. This concern is  
especially valid in light of the fact that standard implementers practice  
numerous SEPs, exposing them to litigation by a vast number of SEP  
holders. Thus, in the RAND context, the legal costs are not foreseeable at  
all and the implementer does not receive a benefit commensurate with the  
cost. A Washington court would recognize this logic.



1 Finally, the exception makes particular sense in light of the purpose  
2 of the RAND commitment, which is to encourage widespread adoption of  
3 the standard. Widespread adoption would be discouraged if standard  
4 implementers were forced to defend injunctive relief claims brought in bad  
5 faith with no possibility of recovering the attorney's fees associated with  
6 doing so. Potential implementers would be less likely to adopt the standard  
7 if doing so would expose them to bad faith injunctive relief claims and they  
8 were forced to absorb the cost of defending themselves. Conversely, faced  
9 with no legal consequences, SEP holders would not think twice about  
10 bringing claims for injunctive relief (even in bad faith) to gain leverage in  
11 licensing negotiations. As discussed above, standard implementers practice  
12 many patents and expose themselves to lawsuits from a substantial number  
13 of SEP holders. In this unique context, it would not be equitable to prohibit  
14 the award of attorney's fees as an element of damages. Accordingly, the  
15 court concludes that Washington courts would recognize an exception to  
16 the American rule where seeking injunctive relief to enforce a RAND-  
17 committed patent is found to be a violation of the duty of good faith and  
18 fair dealing.

19 This conclusion is limited to this context and will require certain  
20 safeguards at trial. In particular, the court is mindful of the fact that  
21 attorney's fees are only recoverable as damages under this framework if  
22 Motorola's efforts to seek injunctive relief are in bad faith. Thus, it will be  
23 necessary to instruct the jury that it may not award attorney's fees as  
24 damages unless it finds that Motorola violated its duty of good faith and  
25 fair dealing specifically by seeking injunctive relief. If the jury finds only  
26 that Motorola's general course of conduct, but not its efforts to seek  
27 injunctive relief, violated the good faith duty, attorney's fees will be  
28 unavailable as damages. The court will prepare a verdict form requiring the  
29 jury to indicate whether it finds that Motorola's efforts to seek injunctive  
30 relief, specifically, were in violation of its good faith duty in addition to  
31 more general inquires relevant to Microsoft's other theories of breach.

32 (8/12/13 Order at 26-33 (footnotes omitted).) Having addressed this issue before, the  
33 court will not address it again.

34 Motorola's second argument also fails. Motorola argues that Microsoft "failed to  
35 present evidence" that Motorola's actions caused Microsoft to move its European  
36 distribution facility from Germany to the Netherlands. (Motorola Renewed Mot. at 28.)

1 This is a frivolous contention. Microsoft did present this evidence at trial. Indeed,  
2 Microsoft presented sufficient evidence for a reasonable jury to conclude that Microsoft  
3 suffered damages. (*See, e.g.*, 8/29/13 Tr. (Davidson Testimony) 68:6-13, 69:8-13, 71:18-  
4 20, 83:1-4; 8/27/13 Tr. (Treadwell Testimony) 56:19-57:12; 8/30/13 Tr. (Menenberg  
5 Testimony) 94:26-116:8.) The court must consider this evidence in the light most  
6 favorable to Microsoft, and accordingly rejects Motorola's argument. *See Reeves*, 530  
7 U.S. at 150-51. The court also rejects Motorola's sufficiency of the evidence argument  
8 regarding attorney's fee damages. (Motorola Renewed Mot. at 29-30.) Microsoft  
9 presented evidence with respect to all of its claimed attorney fee damages, and the  
10 evidence was sufficient for a reasonable jury to find in Microsoft's favor. (*See, e.g.*,  
11 9/3/13 Tr. (Killough Testimony) 21:10-36:21, Ex. 6651-56, 6658-59, 6339-59, 6187-  
12 6196, 6179, 6180, 6182, 6186, 6202-10, 6212, 6608; 8/28/13 Tr. (Gutierrez Testimony)  
13 153:17-154:9.)

14 Last, the court rejects two minor arguments that Motorola makes almost in  
15 passing. Motorola argues, in a single paragraph, that "undisputed evidence shows that  
16 Microsoft failed to mitigate its damages." (Motorola Renewed Mot. at 30.) Mitigation is  
17 a defense for which Motorola has the burden of proof. *Bernsen v. Big Bend Elec. Co-op,*  
18 *Inc.*, 842 P.2d 1047, 1052 (Wash. Ct. App. 1993) ("The burden of proving failure to  
19 mitigate is on the party whose wrongful conduct caused the damage."). The court has  
20 examined the evidence presented at trial by Motorola regarding mitigation (*see, e.g.*,  
21 8/29/13 Tr. (Davidson Testimony) 83:25-84:10; 9/3/13 Tr. (Roberts Testimony) 65:20-  
22 22, 201:8-12, 17-18) and, viewing that evidence in the light most favorable to Microsoft,

1 *Reeves*, 530 U.S. at 150-51, concludes that a reasonable jury could conclude that  
2 Motorola has not met its burden of proof. This is sufficient to reject this argument even  
3 without considering any evidence presented by Microsoft on this topic.

4 The court also rejects Motorola's contention that Motorola Solutions is not liable  
5 for damages caused by the German action. (*See* Motorola Mot. at 30.) Once again, this  
6 argument is presented in one short paragraph, giving the court little authority or argument  
7 to assist it in properly considering the motion. (*See id.*) However, the court concludes  
8 that, in the context of a Rule 50(a) motion, Motorola's argument must be rejected. The  
9 court should grant a Rule 50(a) motion only if it concludes that no reasonable juror could  
10 find in favor of the non-moving party. *Anderson*, 477 U.S. at 250. Here, a reasonable  
11 juror could conclude that Motorola Solutions is liable for damages based on the German  
12 action. As an initial matter, it must be remembered that throughout this litigation and in  
13 front of the jury, Motorola has consistently referred to itself simply as "Motorola" even  
14 though there are technically three separate entities under that umbrella term. Motorola  
15 has made some efforts to distinguish between the three different Motorola entities, but, in  
16 general, has lumped all three together and referred to them as one. This supports a  
17 waiver argument. However, the court declines to rule on a waiver argument because a  
18 reasonable jury could conclude that Motorola Solutions is liable for costs incurred as a  
19 result of the German action. Put simply, the evidence presented at trial supports a finding  
20 that all of Motorola's conduct in this case was interconnected, and that all three entities  
21 were involved in an interconnected pattern of behavior that violated the duty of good  
22 faith and fair dealing. More specifically, Microsoft presented evidence at trial that

1 Motorola sought injunctions in Germany in order to hold up Microsoft and gain leverage  
2 in licensing negotiations. (*See, e.g.*, 8/29/13 Tr. (Murphy Testimony) 125:11-127:2;  
3 138:12-143:8, 146:23-147:10, 135:18-136:19, 169:18-170:17; 8/28/13 Tr. (Gutierrez  
4 Testimony) 154:24-155:23, 156:9-16; 8/27/13 Tr. (Dailey Testimony) 125:23-126:11;  
5 8/29/13 Tr. (Blasius Testimony) 107:16-19.) Those licensing negotiations were being  
6 conducted on behalf of all Motorola entities, and a reasonable jury could easily conclude  
7 that all Motorola entities (or one person acting on behalf of all Motorola entities) were  
8 involved in the strategy of “holding up” Microsoft. The court must view the evidence in  
9 the light most favorable to Microsoft, *Reeves*, 530 U.S. at 150-51, and, doing so,  
10 concludes that a reasonable jury would be justified in reaching this conclusion and  
11 holding all Motorola entities liable for the consequences of Motorola seeking injunctive  
12 relief in Germany. The court finds that the jury could reach this conclusion irrespective  
13 of which party was actually named as a plaintiff in the German action. Accordingly, the  
14 court rejects this argument and concludes that Motorola is not entitled to judgment as a  
15 matter of law with respect to damages.

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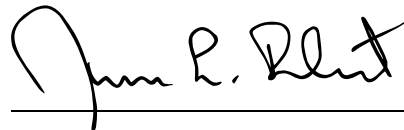
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**IV. CONCLUSION**

For the foregoing reasons, the court DENIES Motorola's motion for judgment as a matter of law under Rule 50(a) (Dkt. # 904) based on the evidence presented at the close of Microsoft's case-in-chief. The court also DENIES Motorola's renewed motion for judgment as a matter of law under Rule 50(a) (Dkt. # 905) based on the evidence presented at the close of all evidence.

Dated this 24th Day of September, 2013.

A handwritten signature in black ink, appearing to read "James L. Robart", is written over a horizontal line.

JAMES L. ROBART  
United States District Judge